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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 885.

JOHN G. WIGGINS, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE UNITED STATES IN THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 20, 1876.

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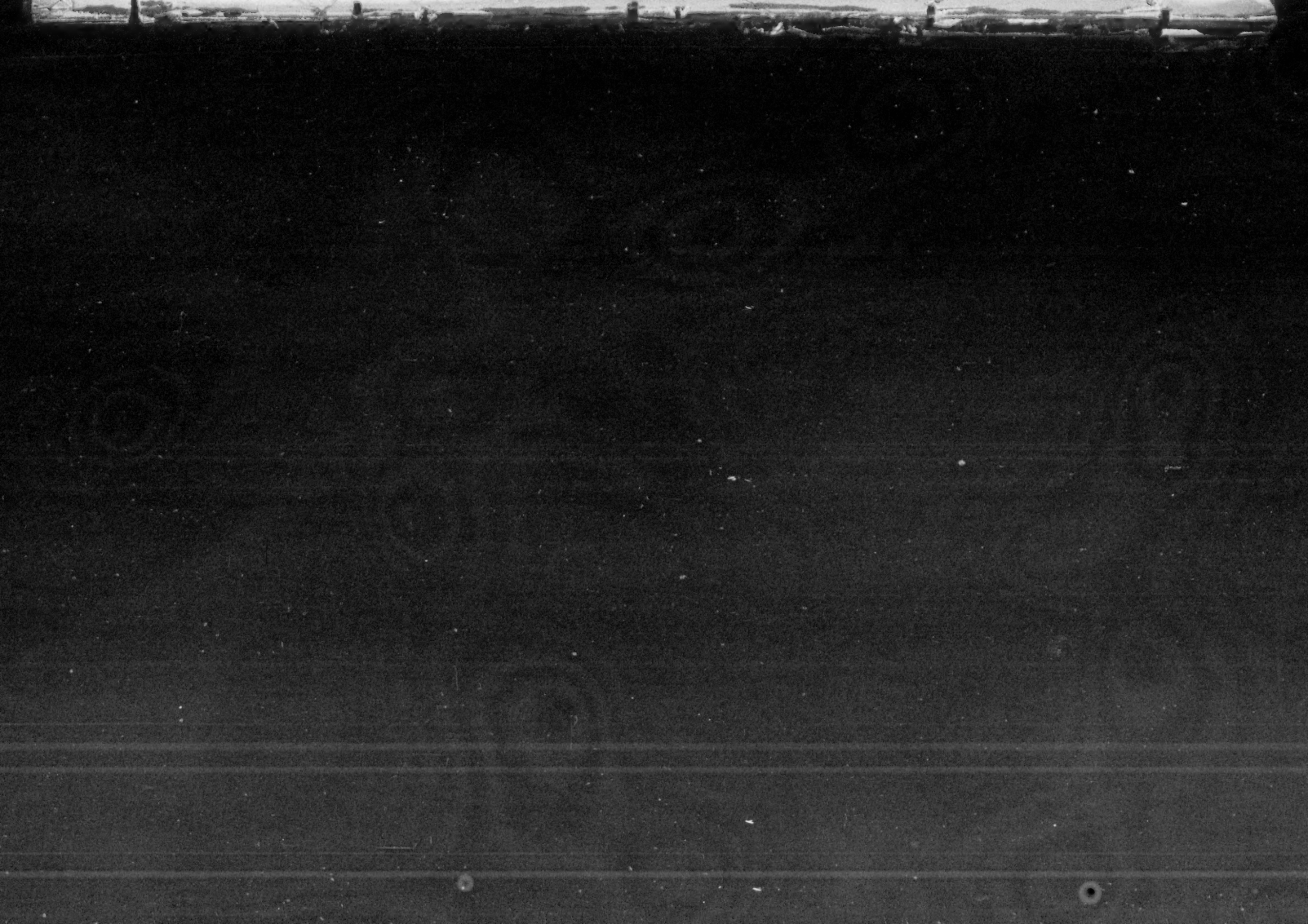
Dismissed
Chief Jus



25-53

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1 In the supreme court.

TERRITORY OF UTAH,
County of Salt Lake, ss:

At a term of the supreme court in and for the Territory of Utah, begun and held at Salt Lake City, county of Salt Lake, Territory of Utah, on the 5th day of June, A. D. 1876.

Present, and presiding, his honor Michael Schaeffer, C. J., and his honor Philip H. Emerson, A. J., his honor Jacob S. Boreman, A. J.

Among the records and proceedings of said court were the following, to wit:

On the 1st day of May, A. D. 1876, came John G. Wiggins, by his attorney and counsel, E. D. Hoge, and filed with the clerk of said court the records and proceedings had in the district court of the 3rd
2 judicial district of the Territory of Utah; of which the following is a full, true, and correct copy, namely:

TERRITORY OF UTAH,
Third Judicial District, ss:

Of the October term, A. D. 1875, of the district court in and for said district, held in Salt Lake County.

THE PEOPLE OF THE UNITED STATES IN the Territory of Utah
vs.
JOHN G. WIGGINS. } Indictment for murder.

The grand jurors of the people of the United States, in the Territory of Utah, good and lawful men, residents of the third
3 judicial district of said Territory, legally chosen, selected, empanelled, sworn, and charged, in and for the body of said district, in the name and by the authority of the people aforesaid, on their oath do find and present that John G. Wiggins, late of the county of Salt Lake, in said district, on the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-five, in the city and county of Salt Lake, and Territory of Utah, within the jurisdiction of this court, in and upon one John Kramer feloniously, willfully, deliberately, premeditatedly, and with malice aforethought did make an assault, and that the said John G. Wiggins a certain pistol, otherwise called a revolver, then and there charged with gunpowder and leaden bullet, then and there feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, did discharge and shoot off to, against, and upon the said John Kramer, and that the said John G. Wiggins with the
4 leaden bullets out of the pistol, otherwise called a revolver aforesaid, then and there, by the force of the gunpowder aforesaid by the said John G. Wiggins discharged and shot off as aforesaid, then and there feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, did strike, penetrate, and wound the said John Kramer in and upon the chin and in and upon the abdomen of the said John Kramer, giving to the said John Kramer then and there with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the of said mortal wounds being in and upon the abdomen of him, the said pistol, otherwise called the revolver aforesaid, by the said John G. Wiggins, two mortal wounds, one John Kramer, and the other one of said mortal wounds being in and upon the chin of him, the said John

Kramer, of which two said mortal wounds the said John Kramer then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said John G. Wiggins the
5 said John Kramer, in the manner and by the means aforesaid, feloniously, willfully, deliberatedly, premeditatedly, and of his malice aforethought, did kill and murder, contrary to the form of the statute of Utah Territory in such case made and provided, and against the peace and dignity of the people aforesaid.

2nd COUNT. And the grand jurors aforesaid, upon their oaths aforesaid, do further find and present that John G. Wiggins, late of the county of Salt Lake, in the Territory of Utah, on the fifteenth day of May, A. D. 1875. in the city of Salt Lake, in the county of Salt Lake, in the Territory of Utah, within the jurisdiction of this court, in and upon one John Kramer, feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, did make an assault, and did then and there discharge and shoot off to, against, and upon the said John Kra-
6 mer, a certain pistol, otherwise called a revolver, then and there charged with gunpowder and two leaden bullets, which said pistol, otherwise called a revolver, he, the said John G. Wiggins, in his right hand then and there had and held, and with the two leaden bullets aforesaid, out of the pistol, otherwise called a revolver, aforesaid, by force of the gunpowder aforesaid, did, then and there, feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, strike, penetrate, and wound him, the said John Kramer, giving to him, the said John Kramer, then and there, with the two leaden bullets aforesaid, so as aforesaid discharged and shot out of the pistol, otherwise called a revolver, aforesaid, by the said John G. Wiggins, two mortal wounds, of which said two mortal wounds the said John Kramer instantly died. And so the grand jurors aforesaid, on their oath aforesaid, do say that the said John G. Wiggins him the said John Kramer, in the
7 manner and by the means aforesaid, feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, did kill and murder, contrary to the form of the statute of Utah Territory in such cases made and provided, and against the peace and dignity of the people aforesaid.

HORACE BLISS,
Foreman of Grand Jury.

WILLIAM CAREY,
Attorney of the United States for the Territory of Utah.

8 (Endorsed:) The People, &c., vs. John G. Wiggins. Indictment for murder. A true bill. Horace Bliss, foreman. Presented in open court by the foreman of the grand jury in the presence of said grand jury, and filed by me this 30th day of October, A. D. 1875. Ewd. B. McKean, clerk. Witness: Thomas Dobson, William G. Philipps, Andrew Smith. William Carey, attorney of the United States for the district and Territory of Utah.

9 In the third judicial district court of Utah Territory, county of Salt Lake, February term, 1876.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah, plaintiff,
vs.
JOHN G. WIGGINS, DEFENDANT.

John G. Wiggins, being duly sworn, on his oath, deposes and saith

as follows: That he is the defendant herein; he further says that he cannot, with safety, proceed with the trial of this cause at this term of the court, for the following reasons, to wit: On the ground of the absence of material witnesses for him in his defense of this prosecution, to wit:

10 On the ground of the absence of Henry Home and Henry Eastman, both of whom are at this time absent from the Territory of Utah, and are now temporarily residing in the city of San Francisco, in the State of California, w'ither both of said witnesses went on business and to spend the winter, and who state, in letters to this affiant, that they will be at their homes in Utah by the May term of this court. And both of whom, when at home, reside in Salt Lake City, in Utah Territory.

Affiant further says, on his oath, that if time is allowed him for that purpose, he expects to be able to procure the attendance of both of said witnesses by the May term of this court.

Affiant further says that he expects to be able to prove by said witnesses, if allowed so to do, that on the night of the alleged killing mentioned in the indictment herein, and a short time prior to the killing, the said John Kramer, the deceased, told both of said witnesses that either he, the

11 said John Kramer, or this affiant, had to die before they went to bed, at the same time brandishing his pistol, being a Colt's six-shooter, declaring and asserverating that he intended to kill this affiant on sight. He further says that both of said witnesses communicated such intelligence and threats made by the said John Kramer to this affiant a short time before the killing took place. He further says that he knows of no other witness or witnesses by whom he can prove the same facts; further states that since the said alleged killing he has been in prison continually up to the present time, and has not had the opportunity of exercising that degree of diligence he could otherwise have exercised had he had his freedom; but that through the instrumentality of the few friends that he has had he has used all the exertion and diligence at his command and in his power to procure the attendance of said witness', they being beyond the process of this court; that he has

12 oft and repeatedly written to said witnesses, who have answered to the effect that they will be in Salt Lake City by the May term of this court.

Affiant further says that he has fully and fairly stated all the facts which he expects to be able to prove by said witnesses to his counsel in this case, and by whom he is informed that the said testimony will be important to him in his defence in this action. He further says that this application is not made for delay, but in good faith, that justice may be done in the premises.

JOHN G. WIGGINS.

Subscribed and sworn to before me this 8th day of March, A. D. 1876.

WM. H. BETTS, *Clerk*,
By WILLIS P. McBRIDE,
Deputy Clerk.

13 (Endorsed:) Dist. court. The People, &c., vs. John G. Wiggins. Affidavit and motion for continuance. Filed March 8th, 1876. Wm. H. Betts, clerk, by Willis P. McBride, deputy clerk. Keithley, deft.'s attorney.

14 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake on the 19th day of November, 1875—

Present, the Hon. Alex. White, judge of the third judicial district.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah *vs.* JOHN G. WIGGINS. } Murder.

Upon the motion of the U. S. district attorney, the defendant being present in court, was arraigned in due form of law, and having heard the indictment read, pleads "not guilty" to the indictment for murder filed against him.

It is ordered, the defendant being present in open court, that this cause be set for trial November 24th, 1875.

15 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake, on the 24th day of November, A. D. 1875—

Present, the Hon. Alex. White, judge of the third judicial district.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah *vs.* JOHN G. WIGGINS. } Murder.

It appearing to the court that material witnesses for the proper defence of this action are absent, it is ordered that this cause be continued for the term.

16 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake on the 8th day of March, A. D. 1876—

Present, the Hon. P. H. Emerson, judge of the third judicial district.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah *vs.* JOHN G. WIGGINS. } Murder.

The defendant in this cause being present and trial ordered, the clerk proceeded to draw a jury, and the panel not being filled, the cause was continued until the following day.

I, W. P. McBride, clerk of the dist. court of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

17 In witness whereof I have hereunto set my hand and the seal of said court this twenty-eighth day of April, A. D. 1876.

W. P. McBRIDE, *Clerk.*

At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house, in the city and county of Salt Lake, on the 9th day of March, A. D. 1876.

Present, the Hon. P. H. Emerson, judge of the third judicial district.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah *vs.* JOHN G. WIGGINS. } Murder.

This cause coming on this day for trial, the following jury, to wit, Timothy B. Clark, Francis K. Benedict, Stephen Crompton, John Siddoway, T. C. Armstrong, Geo. M. Hudson, Samuel L. Ensign,
18 Edwin Harmon, John Welch, Thomas Rogers, Isaac R. Pierce, and Levy E. Riter, were duly empanelled and sworn well and truly to try the issue between the parties. Witnesses on the part of plaintiff and defendant were sworn and examined, and not having concluded, the case was continued till to-morrow.

I, W. P. McBride, clerk of the district court of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand and the seal of said court this twenty-eighth day of April, A. D. 1876.

W. P. McBRIDE, *Clerk.*

19 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house, in the city and county of Salt Lake, on the 10th day of March, A. D. 1876.

Present, the Hon. P. H. Emerson, judge of the third judicial district.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah *vs.* JOHN G. WIGGINS. } Indictment for murder.

This cause coming on this day for trial, the parties, their counsel, and the jury being present, after hearing the proofs and allegations of the parties, the arguments of counsel, and the charge of the court, the jury retired to consider of their verdict, and, after being absent for a time, returned into court, and, being called, answered to their names and say that they find the said John G. Wiggins guilty in manner and
20 form as in the indictment in this cause charged; which said verdict is in words and figures following, to wit:

"We, the jury empanelled in the above case, do find that the defendant, John G. Wiggins, is guilty of murder in the first degree.

"LEVY E. RITER, *Foreman.*"

I, W. P. McBride, clerk of the district court of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand and the seal of said court this twenty-eighth day of April, A. D. 1876.

W. P. McBRIDE, *Clerk.*

21 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house, in the city and county of Salt Lake, on the 21st day of March, A. D. 1876.

Present, the Hon. P. H. Emerson, judge of the third judicial district.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah
vs.
JOHN G. WIGGINS. } Murder.

In this cause John G. Wiggins, the defendant, having been by the verdict of the jury duly convicted of the crime of murder in the first degree, as appears by the record thereof, and having been by motion of the U. S. district attorney duly arraigned at the bar in open court for sentence, and having been asked by the court whether he had anything to say why judgment should not be pronounced against him, the defendant thereupon made a statement to the court protesting his innocence of the crime for which he was found guilty.

22 Whereupon the court pronounced the following sentence, to wit:

"It is the judgment of the court that you be taken from hence to some place of safe confinement in this county; that you there be safely kept in confinement until Friday, the 23rd day of June next; that between the hours of ten in the forenoon and three o'clock in the afternoon of that day you be taken from your place of confinement and publicly shot until you are dead; and may that God whose laws you have wantonly violated, but whose love and whose mercy is as illimited and boundless as eternity, have mercy on your soul."

23 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, W. P. McBride, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original indictment for murder, affidavit of John G. Wiggins, and the minutes of the court of the dates mentioned in the captions thereof, on file and of record in the above-entitled action, in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 28th day of April, A. D. 1876.

[L. S.] W. P. MCBRIDE, *Clerk.*

24 In the district court, within and for the third judicial district, in the Territory of Utah.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah, plff.,
vs.
JOHN G. WIGGINS, DEFT. } Bill of exceptions.

Be it remembered that on the trial of this cause on the 8th day of March, 1876, being one of the days of the regular February term of said district court, and before a jury was called into the box to try the case, the defendant, by his counsel, made a motion for a continuance of the cause until the next term of this court, which motion was made on the affidavit of defendant, on file in this court, and was in the words and figures following, viz:

In the third judicial district court of Utah Territory, county of Salt Lake, February term, A. D. 1876.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah, plaintiff,
vs.
JOHN G. WIGGINS, DEFENDANT.

John G. Wiggins, being duly sworn, on his oath deposes and saith as follows: That he is the defendant herein. He further says that he cannot with safety proceed with the trial of this cause at this term of this court for the following reasons, to wit, on the ground of the absence of material witnesses for him in his defence of this prosecution, to wit, on the ground of the absence of Henry Home and Henry Eastman, both of whom are at this time absent from the Territory, one of
26 whom is at this time, to wit: Henry Home, is temporarily residing in the city of San Francisco, in the State of California, and the other, to wit, Henry Eastman, the other of said witnesses, is now in Virginia City, in the State of Nevada, whither both of said witnesses went temporarily to reside and on business and to spend the winter, and who state, in letters to this affiant, that they will be at their homes in Utah by the May term of this court, and both of whom, when at home, reside in Salt Lake City, in Utah Territory.

Affiant further says on his oath that, if time is allowed him for that purpose, he expects to be able to procure the attendance of both of said witnesses by the May term of this court. Affiant further says that he expects to be able to prove by the said witnesses, if allowed so to do, that on the night of the alleged killing mentioned in the indictment herein, and a short time prior to the alleged killing, the said John Kramer, the deceased, told both of said witnesses that
27 he, the said John Kramer, or this affiant had to die before they went to bed, at the same time brandishing his pistol, being a Colt's six-shooter, declaring and asserverating that he intended to kill this affiant on sight; he further says that both of said witnesses communicated such intelligence and threats made by the said John Kramer to this affiant a short time before the killing took place. He further says that he knows of no other witness or witnesses by whom he can prove the same facts. He further states that since the said alleged killing, he has been in prison continuously up to the present time, and has not had the opportunity of exercising that degree of dilligence he could otherwise have exercised had he had his freedom, but that through the instrumentality of the few friends that he has had he has used all the exertion and dilligence at his command and in his power to procure
28 the attendance of said witnesses, they being beyond the jurisdiction and process of this court. That he has oft and repeatedly written, to said witnesses, who have answered to the effect that they will both be in Salt Lake City by the May term of this court.

Affiant further says that he has fully and fairly stated all the facts which he expects to be able to prove by said witnesses, to his counsel in this case, and by whom he is informed that the said testimony will be important to him in his defence of this action. He further says that this application is not made for delay, but in good faith, that justice may be done in the premises.

(Signed) JOHN G. WIGGINS.

Subscribed and sworn to before me, W. H. Betts, clerk of the 3rd dist. court, on the 8th day of March, A. D. 1876.

The court then and there overruled the motion for a continu-
29 ance, to which ruling the defendant, by his counsel, then and there excepted.

Dr. J. M. BENEDICT testified:

I am a physician and surgeon and reside in Salt Lake City. I made the examination of John Kramer immediately after his decease, and made a post-mortem examination the next day. There were two pistol-wounds; one in the side, a little back of a middle line from the hollow of the arm down, and just at the free border of the ribs; this I examined, but did not follow this ball, as the other wound was the one that proved fatal. The other shot struck him in the chin, ranging downward, cut the external jugular vein, and the ball was buried in the muscle of the shoulder. Deceased bled to death from this wound. Deceased must have been sitting with his head bowed down (and resting, or nearly so, on his breast) from the course the ball took which
30 caused his death, and the wounds it made in its course.

Afterwards, to wit, on the day and year aforesaid, a jury was empanelled to try the issues, and the prosecuting attorney, to sustain and prove the charges in the indictment, called as a witness one THOMAS DOBSON, who, being sworn, testified as follows:

I am night-watchman on the block from Godbe's corner to Elephant corner. I was on watch the night that John Kramer, commonly called "Dutch John," was killed.

I know John G. Wiggins, the prisoner, and knew John Kramer in his life-time. He was shot on the morning of the 15th day of May, 1875, in front of the Salt Lake House, in Salt Lake City, in the county
31 of Salt Lake, and Territory of Utah. As I came down street about two o'clock in the morning, I saw Dutch John sitting on the carriage-steps of the Salt Lake House, with his face resting on his hands, apparently in a stupor or sleep. Wiggins, the defendant, was with me. He, Wiggins, jumped to my rear and immediately the firing commenced. I do not know and cannot tell who fired the first shot. At the first report, I turned round and saw the blaze of the second shot from a pistol in the hands of Wiggins. I had advanced to the carriage-steps, and said, "Jack, don't kill him." Wiggins then jumped on the carriage-steps and fired another shot, which passed right by in front of me and into the body of Dutch John. Dutch John grabbed me around the legs and we fell over the steps into the street. When I turned and saw the first shot from Wiggins' pistol, I saw Dutch John's hands raised and heard him cry out, "Don't kill me, I am not armed." Im-
32 mediately after the firing ceased, Wiggins stooped down as if to pick up something, and when he raised up he had something in his left hand, but I cannot tell whether it was a pistol or not. At the same time Wiggins made the remark to the deceased, "You wanted to kill me," or "You tried to kill me." I am not sure which expression was used.

On cross-examination, witness stated:

I am night-watchman on what is called Godbe's block, in Salt Lake City. I saw deceased between one and two o'clock on that morning. I walked down the street with Wiggins. I came with him from a short distance below his saloon to the Salt Lake House. I had met the deceased just before the shooting, and he said he had been abused by Wiggins.

Witness was then asked if he did not tell Wiggins that Dutch John

had threatened him, and witness replied that he told Wiggins
33 that deceased had said, I am going to challenge him the next day and he will kill me or I will kill him.

Q. As you came down, did you not warn defendant of what you had heard Dutch John say?

Answer. Nothing but what I have been repeating, which was about the challenge.

Q. Did you not, before Commissioner Kimball, on the preliminary examination of this cause, state that you were warning Wiggins against the deceased, as you were walking down with defendant, or words to that effect?

Ans. I did not.

Q. Did you not, in the preliminary examination of this cause, before the said Commissioner Kimball, as you got opposite to deceased, say to defendant, "There he is now," or words to that effect?

34 Ans. I do not recollect. I don't think I did.

34 HENRY HEATH, a witness for the prosecution, testified as follows:

I was night-watchman on the west side of Main street, in Salt Lake City. I was passing up Main street, opposite the Salt Lake House, when shooting commenced. There were three shots fired; the blaze of the first shot was from east to west, the second shot ranged a litte north of west, and the third still more north of west. I saw all three shots fired. I saw shaddows of men; heard Wiggins' voice; could not say what he said. Saw Wiggins about one o'clock that morning; never saw him but once before. It was too dark to distinguish any one across the street.

On cross-examination he testified as follows:

35 The first shot was from east to west, toward me, and I jumped behind the pillar of the door, for fear of getting hit myself. I was in front of the Salt Lake City National Bank. The first shot was nearly horizontal; I think pointed a little downward, and nearly directly west. The second shot was from the east, ranging north of west. The third shot was from the east, ranging still more north of west, about in the direction of Jenning's corner. My attention was first attracted towards the Salt Lake House by the voice of Wiggins. I cannot tell what he said. I never had seen Wiggins but once before—in fact, I never had seen him, but I had heard his voice once before, when there was a quarrel in his house; but I know it was his voice, and recognized it at the time of the shooting.

36 WILLIAM PHILLIPS, a witness for the prosecution, testified as follows:

I was, at the time Dutch John was killed, police officer of Salt Lake City, and on that night was on duty. I am acquainted with the defendant, and knew Dutch John, the deceased; saw him twice on the night he was shot; he told me, in the first conversation, he had been in Wiggins' saloon and had trouble there; that Wiggins had taken his pistol from him and beat him over the head with it, and showed me the wounds in the head. I told him to go home, that he was drunk. He said he wanted to see John Wright first and then he would go home. He started to go across the street to John Wright's saloon. About an hour after this I came up the street and saw deceased standing in front of the Salt Lake House. I walked up as far as Godbe's corner with de-

ceased. and he was talking about the dif'iculty he had had with
37 Wiggins. During our walk I then advised him to go home again ;
he said he would after a while. I asked him if he was armed, and he said he was not, and threw back his coat and says, "Go through me," and said, "I have nothing but this," and showed me a small pocket-knife. Then he started down the street; in about one minute we followed after him. I heard some one coming out of Wiggins' saloon, and heard the door locked, and Wiggins, his wife, and Jake Barratt came out. Wiggins said to his wife, "Go on down the street," and then came across the sidewalk and commenced talking to me. He said that Dutch John and Bill Bean had a dif'iculty in his saloon, and he had had trouble with them, and that he took their pistols away from them and beat them over the head with them, and put one out of the back door and the other out of the front door; gave Bill Bean back his pistol, and told them they could not have any trouble there, and that if there was any killing there, he was going to do it himself. And I said, "What did you do with Dutch John's pistol?" He pulled back the lap-
38 pel*l* of his coat, and says, "I have it here." Then he went on down the street and overtook his wife and Jake Barratt, and I followed down about 40 or 50 feet behind them. When they got in front of Sear's store I heard Wiggins say, "Give it up, you son of a bitch ; give it up, you God damned-horse thief, or I will put a hole through you in a minute," and told him to run, and the party did run ; and just then Bill Bean came running past me. I called to Wiggins, and said, "What's the matter, Jack?" and he said, "That son of a bitch has pulled a pistol on me." I then saw Dobson coming up the street. I then turned round and ran after Bill Bean, and when we got around Godbe's corner I heard a shot fired. I turned immediately and ran back on to Main street and towards the Salt Lake House. After turning the corner of Godbe's building saw the flash and heard the report of two other shots, and when we got in front of Hale's saloon we heard another shot further down the street. When we came in
39 front of the Salt Lake House Dobson said, "Get Jack Wiggins." We ran to the Elephant corner, and Wiggins was crossing from Elephant corner to Walker's store, and I said, "Jack, hold on," and "come back," which he did. We started up the street. I said, "Jack, I guess you have killed Dutch John;" he said, "If I haven't, I will." When we got in front of the Salt Lake House I asked him for his pistol. He handed me one, saying "That is Bill Bean's;" and another, "That is Dutch John's;" and a third one, a single-barrelled der'inger, and said, "This is mine." The one *in*dentified as Dutch John's had one chamber empty; the one *in*dentified as Bean's had three chambers empty; and the der'inger was loaded.

The prosecution here rested.

40 The defendant put upon the stand a witness by the name of Jacob Barratt, who, being sworn, testified as follows :

I was in Wiggins' saloon from about 11 o'clock until the saloon was closed, at about half past one o'clock on the morning of the 15th of May, just before the shooting of the deceased. The deceased and some six or seven other persons were in the saloon, when a difficulty occurred between Dutch John, a man by the name of Steel, and Bill Bean, who got a lick over the head in the affray. Dutch John and Bean drew their revolvers, when Wiggins interfered and took the pistols from both of them, and in the scuff*el* struck Dutch John over the head. Wiggins then put Bean out of the back door of the saloon, and gave him his pistol and told him to go home, and put Dutch John out of the front door

and told him to go home. Deceased said he would go if he (Wig-
41 gins) would give him his gun. Wiggins then pushed deceased out of the door and handed him his pistol, when deceased made the remark, "I will make it hot for you."

The defendant, on the trial of this cause, called Robert Heslop as a witness in his defence, who testified:

That just a short time before the shooting, the deceased showed him a pistol which he (deceased) then had upon his person. Deceased, at this time, was sitting on a box on the opposite side of the street from the Salt Lake House, and in front of Reggels' store.

The prosecuting attorney admitted that this was after the deceased was ejected from defendant's saloon.

Whereupon the counsel for the defendant asked witness the following questions:

What, if any, threats did the deceased make against the defendant at this time? which was objected to by the prosecuting attorney, for the reason it was immaterial.

42 The objection was sustained by the court, and the defendant, by his counsel, then and there duly excepted.

Defendant's counsel then asked witness what, if anything, did deceased then say concerning the defendant.

(Objected to by prosecuting attorney as incompetent.)

Defendant's counsel thereupon stated that they expected to prove by this witness that in that conversation, a short time prior to the killing, that the deceased, in the hearing of said witness, made the threat that he would kill the defendant before he went to bed on the night of the homicide, which threats we cannot bring home to the knowledge of the defendant.

Which was objected to by the counsel for the prosecution because it was incompetent.

The objection was sustained by the court, to which the defendant then and there excepted.

43 This witness, and several others, testified that the deceased' general character was bad, and that he was a dangerous, violent, vindictive, and brutal man.

WILLIAM BEAN sworn on the part of the defendant:

I was in the saloon of Wiggins on the night of the homicide, when a difficulty arose between Dutch John and a man by the name of Steel, when I got a lick over the head with a pistol. Wiggins took my pistol from me and took Dutch John's from him, and put him out at the front door and put me out of the back door of defendant's saloon. Wiggins gave me my pistol and told me to go home. I was afterwards, and just before the shooting took place, standing in the recess of a door of a house, about half-way between the saloon of defendant and where
44 Dutch John was shot, with my pistol in my hand, cocked. When Wiggins came down street; he grabbed my hand and pistol and told me to give it to him and to leave. I gave him the pistol, and ran up the street towards Godbe's corner.

JAMES C. WATSON testified:

I recollect the night John Kramer, commonly called Dutch John, was killed. It was in May, 1875. I was sitting on the stoop, on the east and front of Kimball and Lawrence's store. I saw the flash of a pistol down in front of the Salt Lake House, followed immediately by a report,

and the cry of murder immediately after the flash and report of the pistol. I saw from the flash that the pistol was directed in a due-west direction. I immediately jumped and ran toward the place. As I crossed the ditch by the corner of Kimball and Lawrence's store
45 there was another shot fired, followed immediately by a third shot. The shots followed each other in quick succession, apparently as quickly as the pistol could be cocked and fired. The second shot was directed a little north of west, and the third still farther north, about in my direction. I ran toward the place whence the firing came; and when near Wells-Fargo's office I heard a fourth shot, still further down the street. When I got in front of the Salt Lake House, I saw Dobson in the street immediately west of the steps, and said, "Tom, what is the matter?" And he pointed his finger down on the ground west of the steps, and said "Look there." I struck a match, and Tom said it was Dutch John. I looked and saw that it was. I said "Who did it?" And Tom said it was Wiggins. Just after that Officer Philips and Smith came back with Wiggins and his wife. I saw Wiggins give three pistols to Officer Philips; he said one was his own-
46 one was Bill Bean's, and the other Dutch John's.

ADAM PATTERSON, the phonographic reporter, who was sworn as such by the commissioner before whom a preliminary examination was held, was sworn as a witness for the defence, and testified as follows:

On the examination before the commissioner, Dobson, after relating what Dutch John, or John Kramer, had detailed as the particulars of the difficulty with Wiggins, said: "Now," said he, "I am going to challenge him. He has got to die or I have." I said, "John, you must not talk that way." Said he, "I am no coward; there never was one in the family." Philips and Smith then came up, and witness left John in conversation with them. Went round the corner, met Wiggins, and continues:
47 While we were going down between the Saddle Rock and the Salt Lake House I was warning him against what I had heard Dutch John say, and told him to look out for him. When we got opposite the bench in front of the Salt Lake House Kramer was there, and I think I said, "Here he is, Wiggins."

THE PEOPLE, &C., PLFF.,
vs.
JOHN G. WIGGINS.

After the close of the testimony, and arguments of counsel for the respective parties, the court charged the jury as follows:

Gentlemen: The prisoner is on trial for one of the greatest offences known to the law, and your position and duty in respect thereto is one of great responsibility. The enforcement of criminal laws in a man-
48 ner most conducive to the public welfare depends in a very important sense upon the fidelity, intelligence, and moral courage of jurors. If through want of judgment, or if failing to appreciate the relation of these duties to the general good, or if through extreme sensibility, in view of the fearful consequences of a conviction of the prisoner, they acquit the guilty, the laws against crime are thereof suspended. Such culpable mistakes would be an evil example to the whole class of depraved men inclined to crime. On the other hand, if through inattention to the testimony, or of a careless and precipitate judgment, a jury pronounces an innocent man guilty, the wrong is no less serious. There is, therefore,

no escape from grave responsibility. By a wise and humane provision of the law every person accused of crime is presumed to be innocent until proven guilty. The prisoner being on trial for a crime, he
49 cannot by the rules of law be convicted unless all the facts that constitute the crime with which he is charged in this indictment are proved beyond a reasonable doubt; so that the first question for you to understand is, what is a reasonable doubt, and what is proof beyond a reasonable doubt? A reasonable doubt is such a one as would arise in the minds of reasonable men on any subject.

Proof beyond a reasonable doubt is such as will remove all such doubt, as will produce an abiding conviction in the mind to a moral certainty, that the facts exist that is claimed to exist—that the fact to be proved actually exists; such proof as produces an abiding conviction in the mind of moral certainty that the fact exists that is claimed to exist—that the fact to be proven actually exists, *such proof as produces an abiding conviction in the mind of moral certainty that the fact exists*, so that you feel certain that it exists. A balance of proof is not
50 sufficient. The facts of this case are entirely with you. To enable a jury to persue this enquiry with a definite aim, the law is explained to them by the court

(2.) In this case the defendant is charged with murder. which is the unlawful killing by a person of sound mind and discretion of a reasonable creature, it being with malice aforethought. Under our statute it consists of two degrees. Those cases, among others, in which the unlawful killing is deliberate and premeditated are of murder in the first degree. Those cases in which there is an unlawful killing with malice aforethought, but not committed with deliberate premeditation, are of murder in the second degree.

(3.) To bring this case within the first degree, you must find that there was malice aforethought, evidenced by a deliberate and premeditated purpose to kill. It is unnecessary that this deliberation should
51 continue for any particular time. But a deliberate purpose should be shown to exist in the prisoner's mind before and at the time of the act. The length of time before the act when this purpose is deliberately formed and the act premeditated is unimportant; it is enough if the purpose is deliberately formed and precedes and induces the act.

(4.) To constitute murder in the second degree, there must be an unlawful killing, and there must be a purpose to kill preceding and accompanying the act, formed suddenly before the killing and without that deliberation and premeditation which distinguishes murder in the first degree.

(5.) If you find from the evidence that at the time of the homicide the defendant on walking along the street with another person, seeing the deceased sitting down and making no demonstration towards him, the defendant, I say if you find that the defendant under such
52 circumstances deliberately draws his pistol and fired upon the deceased, continuing the fireing until or after giving the mortal wound, the killing under such circumstances is murder in the first degree.

(To this instruction the defendant, by his counsel, then and there duly excepted.)

(6.) But the defence rests entirely upon the ground of self-defence, and not that it was not done deliberately, but that the defendant shot the deceased and intended to shoot him, and that this was necessary, or

that he thought it was necessary, in order to protect his own life or his person from great bodily harm.

(To this instruction the defendant, by his counsel, then and there duly excepted.)

(7.) If you find from the testimony that this act of shooting was done under such circumstances and accompanied by such acts and
53 demonstrations on the part of the person killed as to make a reasonable man apprehensive of such great danger, then the killing was no offence at all, but the killing was justifiable.

(8.) The degree of force which a person may use in defending his person or personal liberty must depend upon circumstances.

(9.) To justify taking the life of another, it must be made to appear that his safety required him to do so.

(To this instruction the defendant, by his counsel, then and there duly excepted.)

(10.) If you find that the deceased made any demonstrations towards the defendant, the defendant had a right to act upon these demonstrations, and if they were such as to induce a reasonable man to be apprehensive of danger to himself, he had a right to act upon these
54 apprehensions, although it may turn out in the end that he was mistaken as to the intent of the deceased.

(11.) To excuse the taking of human life, the danger must be actual and imminent, or under such circumstances that a reasonable and ordinary man would believe it to be actual and imminent. Human life is not to be lightly regarded.

(To this instruction the defendant then and there, by his counsel, duly excepted.)

(12.) Mere threats will not excuse an assault and battery; much less will they excuse an assault with a deadly weapon; but in order to be any excuse, they must be accompanied by or connected with a present purpose and ability to carry those threats into execution.

(To this instruction the defendant then and there, by his counsel, duly excepted.)

55 (13.) It is only in connection with these acts or demonstrations, or under such circumstances that a reasonable man would believe that the deceased actually intend to carry out some threat, that you will take into consideration the character of the deceased; in no other way can it have anything to do with the case. It makes no difference how bad or how depraved a man the deceased was, it is no excuse to the person who killed him, except in the connection I have above mentioned.)

(To this instruction the defendant then and there, by his counsel, duly excepted.)

(14.) The defendant can derive no advantage from the character of the deceased for violence if you find the killing took place under circumstances that showed that he did not believe himself in danger or under circumstances that no reasonable man ought to have believed himself in danger.

56 (15.) If upon a careful review of all the testimony in this case you believe beyond a reasonable doubt that the defendant deliberately and intentionally killed the deceased without the legal excuse I have mentioned, then it is your duty to find him guilty, and so pronounce in your verdict. If you find him guilty of an unlawful killing, you will then enquire and state in your verdict the degree of crime. If you find that the killing was justifiable, of course your verdict will be "not guilty."

The foregoing are all the instructions given by the court in the case.

To all of which rulings, opinions, and instructions of the court the defendants then and there, by his counsel, duly excepted, and prays this his bill of exceptions may be signed and certified by the court which is accordingly done.

57 And because the matters herein do not sufficiently appear of record, I have caused this statement on appeal to be made up, and I hereby certify the same to be correct.

(Signed) PHILIP H. EMERSON,
Judge.

Printing of transcript and briefs in this case may be dispensed with, by reason of the poverty of appellant, and on request of appellant's att'y.

Salt Lake City, April 26th, 1876.

PHILIP H. EMERSON,
Judge who tried the case.

(Endorsed:) 3rd dist. court. Transcript. People, &c., vs. John G. Wiggins. Filed May 1st, A. D. 1876. Chas. A. Gould, clerk of supreme court U. T., by H. A. Gould, dept'y clerk.

58 In the supreme court.

TERRITORY OF UTAH,
County of Salt Lake, ss:

THE PEOPLE, &C., RESPONDENT,
vs.
JOHN G. WIGGINS, APPELLANT. } Appeal from 3rd district court.

Afterwards, to wit, on the 12th day of June, A. D. 1876, said cause came on to be heard on the transcript of record from the district court, counsel appearing for both parties. Whereupon, after argument by counsel, the cause was submitted to the court and held under advisement until the 16th day of June, A. D. 1876, when the court made the following order:

Ordered and adjudged, that the judgment of the court below be, and the same is hereby, affirmed.

59 Supreme court.

TERRITORY OF UTAH,
County of Salt Lake, ss:

THE PEOPLE, &C., RESPONDENT,
vs.
JOHN G. WIGGINS, APPELLANT.

Afterwards, to wit, on the 20th day of June, A. D. 1876, the court made the following order:

Ordered, The judgment heretofore rendered in this court in the above-entitled cause having been taken to the Supreme Court of the United States by writ of error, pursuant to law, it is hereby ordered that the execution of the judgment and sentence in said cause be postponed

until the second day of the January term, for the year 1867, of this court, and until further order of this court.

60 In the supreme court of Utah Ter., June term, 1876.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah, respondents,
vs.
JOHN G. WIGGINS, APPELLANT.
} Appeal from 3rd district court.

BOREMAN, justice, delivered the opinion of the court:

In October last the defendant was indicted for murder. Having been duly arraigned, and pleaded "not guilty," his case was set for trial on the 24th day of November following. At the latter date, upon application of defendant, by reason of the absence of material witnesses, the cause was continued for the term.

61 At the following term, on the 8th day of March, 1876, defendant filed his affidavit for a further continuance on account of the absence of material witnesses; but this application for a continuance was denied.

Whereupon a trial was had, and a verdict of guilty of murder in the first degree rendered, and defendant sentenced to be shot on the 23rd day of the present month, a motion for a new trial having been overruled. The defendant appeals to this court.

The first error assigned is the overruling the application for a continuance in March last. From the affidavit of the defendant it appears that the desired witnesses went to San Francisco "on business and to spend the winter;" that their homes at the time were in Salt Lake City, and that they were absent "temporarily" only. But when they went to San Francisco "to spend the winter" does not appear, and whether they did spend the winter there, or elsewhere out of the Territory, does not appear.

62 It is not shown that affiant did not know they were going, nor that he did not know before they went away that they were material witnesses for his defence. Indeed, there is nothing in the affidavit to show that the witnesses did not go away by his consent, and there is nothing whatever to show that they could not have been subpœn'ed before they left. Yet no effort was made to have them subpœnaed or to get their testimony on the trial.

We do not, therefore, think that proper dilligence was shown.

Applications for continuance being always addressed to the sound discretion of the court, we cannot say that the court below has abused that discretion.

The second error assigned is the action of the court in the ruling out the testimony of threats made by the deceased against the defendant shortly before the homicide, but which threats were not communicated to the defendant before the killing.

63 It is a general rule that such uncommunicated threats are inadmissable. There are, however, exceptions to the rule. Defendant claims that in this instance there is an exception to the rule, and that there is a conflict of testimony as to who fired the first shot, and that the evidence of said threats should be introduced to aid the jury in arriving at a correct conclusion on the point.

As the prisoner and one of the witnesses were walking down street and saw the deceased, he, deceased, was sitting upon a carriage-step in front of a public hotel, with his hands up to his face and his head bowed

down, and was apparently in a stupor or asleep. As they were thus passing, the defendant jumped behind the witness, and immediately the firing commenced, and the testimony of two witnesses is that the firing was from east to west. The prisoner was on the east of deceased. The fact that the witness who was walking with the prisoner did not know who fired the first shot is in its character negative testimony, and cannot be weighed agaist the positive testimony of two witnesses, referred to, which showed that it was impossible that deceased
64 should have fired the first shot.

The fact that defendant stooped down as if he picked up something, after the shooting, and the fact that deceased was shown to have had a pistol shortly before his death, might, if there were no other facts proven, be sufficient to raise a doubt as to whether deceased had a pistol at the time of his death, but it could not raise a doubt as to who fired the first shot. But we do not think that the deceased even had a pistol when the killing took place. His pistol was in the hands of defendant just before and just after the killing, and if deceased had a pistol as one witness testifies, shortly before his death, it was evident that he did not have it when he was killed; for after the first shot he threw up his hands and said, "Do not kill me; I am unarmed"—a thing which it is not reasonable to suppose he would have said if he had just fired the first shot; and, besides, no such pistol was found on his per-
65 son, nor near him, after the killing. If defendant had picked up such a pistol, it would certainly have been found upon him, and this was not the fact. This second pistol, if any existed, could not have been in deceased's possession when he was killed.

We do not, therefore, think there was a conflict in the evidence as to who fired the first shot, and we cannot see that there was any error in the action of the court below in refusing to allow a proof of the uncommunicated threats referred to.

The giving of what are called the 5th, 6th, 9th, 11th, 12th, & 13th instructions is objected to. Some of these instructions, if taken separately, might be objectionable. It is a well-established rule that all of the instructions given are to be considered together, and in some cases the jury is reminded of this duty. This rule, that all of the instruc-
66 tions are to be considered together, is the true one, when the propositions of law are given separately to the jury.

In the present case, however, the declarations of law are not given separately, but all are embodied as a whole in one statement of the law. In such a case, it certainly was not necessary to remind the jury that they must take the instructions together as a whole, for they were given as a whole, although for convenience in this court the counsel have divided the charge up into various parts, and designated and numbered these as distinct instructions.

Taking the whole case together, therefore, we do not find any error. It was fairly presented to the jury. The jury have found their verdict, and we do not see wherein they have erred in so doing. The painful character of such cases—the prisoner being under sentence of death—admonishes the court to be especially careful that no wrong be done; yet the character of the case cannot be expected to influence
67 the court to depart from what it believes to be clearly the law and justice of the cause.

It is, therefore, the order of this court that the judgment of the court below be affirmed.

The other judges concur.

(Endorsed:) The People, &c., vs. John G. Wiggins. Opinion of court by Boreman, justice. Filed in office clerk of supreme court June 16th, A. D. 1876. Chas. A. Gould, clerk, by H. A. Gould, dep'ty clerk.

68 The United States of America to the people of the United States in the Territory of Utah, and Sumner Howard, attorney for said people, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah, wherein John G. Wiggins is plaintiff in error, and you, the said People of the United States in the Territory of Utah, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and reversed, and why speedy justice should not be done to the parties in this behalf.

Witness the honorable Michael Schaeffer, chief-justice of the supreme court of the Territory of Utah, this 20th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

MICHAEL SCHAEFFER,
Chief-Justice of Supreme Court, Terr'y Utah.

69 I hereby acknowledge service of the within citation by a copy thereof delivered to me this 20th day of June, 1872.

SUMNER HOWLAND,
U. S. Dist. Atty. for Utah Territory.

(Indorsed:) John G. Wiggins, plaintiff in error, vs. The People of the United in the Territory of Utah, defendants in error. Citation. Filed June 20th, A. D. 1876. Chas. A. Gould, clerk, by H. A. Gould, dep'ty clk. W. R. Kantleby, J. D. Lomax, C. H. Hampstead, & E. D. Hoge, attorneys for plff. in error.

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court for the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, and between the people of the United States in the Territory of Utah and John G. Wiggins, a manifest error hath happened, to the great damage of the said John G. Wiggins, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then, under your seal, distinctly
71 and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said

Supreme Court, the seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] CHAS. A. GOULD,
72 *Clerk of the said Supreme Court of the Territory of Utah,*
By H. A. GOULD,
Deputy Clerk.

(Indorsed:) Supreme court of the Territory of Utah. Writ of error. John G. Wiggins, plaintiff in error, vs. The People of the United States in the Territory of Utah, defts. in error. Filed in the clerk's office of the supreme court for Territory of Utah, June 17th, A. D. 1876. Chas. A. Gould, clk., by H. A. Gould, dept'y clk.

73 Supreme court.

TERRITORY OF UTAH,
County of Salt Lake:

Afterwards, to wit, on the 20th day of June, A. D. 1876, came the appellant, John G. Wiggins, by his attorney, E. D. Hoge, and filed in the office of the clerk of said supreme court of Utah Territory an assignment of errors, which is in the words and figures as follows:

UNITED STATES OF AMERICA:

In the Supreme Court of the United States, in error to the supreme court of the Territory of Utah.

JOHN G. WIGGINS, PLAINTIFF IN ERROR,
vs.
THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah, defendants in error. } In error.

Now comes the said John G. Wiggins, by W. R. Keithly, J. C. LENNOX, C. H. Hempstead, and E. D. Hoge, his attorneys, and says
74 there is manifest error in the record, proceedings, and judgment of the supreme court of the Territory of Utah, and assign the following as error, to wit:

First. The court erred in affirming the judgment of the district court of the third judicial district of Utah Territory.

Second. The court erred in holding that the affidavit upon which the motion for a continuance was made, was insufficient.

Third. The court erred in sustaining the ruling of the district court, viz, that the uncommunicated threats of deceased made in connection with the exhibition of a pistol, a short time before the homicide, as appeared to be proved by the witness Robert Heslop, were inadmissable, and in sustaining the ruling of said court wherein and whereby the testimony of said witness as to such threats was excluded.

75 Fourth. The court erred in affirming the ruling of the said district court in overruling the exceptions of the plaintiff in error to the charge of said court as set forth in instructions and paragraphs numbered five, six, nine, eleven, twelve, and thirteen, as appears in the bill of exceptions.

The plaintiff in error therefore prays that the judgment of the supreme court of Utah Territory may be reversed, and that a mandate may issue from this honorable court, directing the said supreme court of said Ter-

ritory to reverse the judgment of the district court, and remand the case for further proceedings.

W. R. KEITHLY,
J. D. LOMAX,
CHAS. H. HEMPSTEAD, and
E. D. HOGE,
Attorneys for Plaintiffs in Error.

(Endorsed:) Sup. court Utah Territory. John G. Wiggins, plaintiff in error, vs. People United States in Territory of Utah, defendants in error. Assignment of errors. Filed in office of clerk of Supreme Court June 20th, A. D. 1876. Chas. A. Gould, clerk, by H. A. Gould, deputy clerk.

76 Supreme court.

UNITED STATES OF AMERICA,
Territory of Utah:

I, Ezra T. Sprague, clerk of the supreme court of the United States in and for the Territory of Utah, certify that, in obedience to the commands of the writ of error hereto attached, I return said original writ, with the original citation therein issued, containing the acknowledgment of service therein endorsed; and I further certify that the foregoing is a full, true, and correct copy of the papers, records, and proceedings in this cause on file and of record in my office, and a true copy of the original opinion and assignment of errors also on file in my office.

In testimony hereof I have hereunto set my hand and affixed the seal of said court in Salt Lake City, in said Territory, this 3rd day of August, A. D. 1876.

[SEAL.] E. T. SPRAGUE, *Clerk.*

(Indorsement on cover:) No. 885. John G. Wiggins, plff. in error, vs. The People of the United States in the Territory of Utah. Utah Territory sup. ct. Filed 20 October, 1876.

IN THE

Supreme Court

OF THE

UNITED STATES OF AMERICA.

JOHN G. WIGGINS,
Plaintiff in Error,

vs.

THE PEOPLE OF THE UNITED STATES IN THE TERRITORY OF UTAH.
Defendant in Error.

This is an indictment for murder, found at the October Term, A. D. 1875, of the District Court of the Third Judicial District, of the Territory of Utah.

Trial at the February Term of said Court, A. D. 1876, commencing on the 8th day of March, 1876. Verdict—Guilty of murder in the first degree, and judgment thereon. Appeal to Supreme Court of said Territory on Bill of Exceptions, or Statement on Appeal, settled, signed and certified pursuant to the prac-

tice in said Territory, by Hon. P. H. Emerson, before whom the case was tried. Appeal heard by Supreme Court, at May Term, 1876. Judgment below affirmed, and sentence suspended until January, 1877. Writ of Error allowed from Supreme Court of United States to Supreme Court of Territory.

Record filed in Supreme Court, October, 1876.

The errors assigned and relied upon will be found in the Bill of Exceptions, or Statement on Appeal, signed and certified by his Hon. P. H. Emerson, before whom the case was tried, and to be found in the Record.

I.

The first error assigned is the overruling of the motion for a continuance, made on the affidavit of the Appellant.

We claim the motion should have been granted. The affidavit sets forth in full the facts expected to be proved, and discloses the fact that the testimony was material to a complete defense.

People vs. Vermilyea, 7 Cowan 384 and 398.

3 Graham and Waterman, N. T. 1001.

People vs. Dodge, 28 Cal. 445.

II.

The second error assigned is the action of the Court in ruling out the testimony of threats made by the deceased against the Defendant shortly before the homicide, which threats the Attorneys for the prisoner at the trial admitted were not communicated to the Defendant before the killing.

The Record shows that the fact of killing was not contested by the Defendant on the trial, and the defence that it was committed in self defense, to-wit.: That the first assault was really made by deceased, and that the Defendant (below) had reasonable cause to believe that his life was in danger; that the defense was in good faith and not a mere sham; that the only witnesses who swore to the fact that the accused fired the first shot, were at a considerable distance from the parties, and the homicide was committed in the night time. In this condition of the testimony the accused, *bona fide* claiming he fired in self defense, the Court excluded the offered testimony of witness Robt. Heslep, that deceased at a late hour of the same night, and immediately preceding the homicide, exhibited a revolver and made threats against the accused, (as disclosed in Bill of Exception), it being admitted by the Attorneys of the accused that they could not bring the knowledge of these threats home to the Defendant before the homicide. The later, and almost uniform decisions, hold that where there is a *bona fide* plea of self defense, uncommunicated threats are admissible, whatever may have been the law as declared by the older authorities.

Uncommunicated threats are admissible as part of the *res gestae* to explain and elucidate the conduct and intention of the deceased. The object of a trial is to elicit the real state of the transaction, and the rules which govern and determine the introduction of testimony bear relation to this end. These rules are not mere arbitrary conventional regulations, they are founded in reason and good sense.

People vs. Arnold, 15 Cal. 476–481.

Cornelius vs. Commonwealth, 15 B. Mon. 539.

Campbell vs. People, 16 Ills. 17.

Williams vs. People, 54 Ills. 422.

Holler vs. State, 37 Ind. 57; Cases Self Defense, 565. (Horrigan & Thompson).

In the case of the People vs. Arnold, 15 Cal. 481, the Court says: "He, the Defendant, had a right to urge as well expressly proven facts as the probabilities and inferences to be drawn from the conduct of the parties connected with the occurrence."

Pitman vs. State, 22 Ark. 354; Cases on Self Defense, 574.

In the case of the People vs. Scoggins, 37 Cal. 674, as appears from a statement of facts in the case, the only witness present at the time of the homicide was the wife of the deceased, who testified positively to the assault having been made by the Defendant, and that the deceased made no demonstration whatever. Yet the Court reversed the judgment on the ground that uncommunicated threats had been ruled out by the Court below. Opinion by Crockett, Justice,

concurring opinion on this point by Sanderson and Sprague, Justices.

People vs. Scoggins, 37 Cal. 676.

Keener vs. State, 18 Ga. 194; Cases Self Defense, 539.

In the case of Campbell vs. People, 16 Ills. 14, the Court uses this language: "Upon the trial the Defendant offered to prove that upon that day and at other times shortly before his death the deceased had made threats against the prisoner. This evidence the Court ruled out, exception was taken." The Court says: "In this the Court below unquestionably erred, although they may never have come to the knowledge of the Defendant till after the homicide was committed."

Campbell vs. People, 16 Ills. 16; Same Case, 10 American, 74.

"Upon the trial of an indictment for murder, evidence of threats made by the deceased against the prisoner is admissible, even though such threats were unknown to the prisoner at the time of the homicide."

Holler vs. State, 37 Ind. 57; Same Case, 10 American, 74.

State vs. Sloan, 47 Mo. 604; Same Case, Self Defense, 526.

In the case of Holler vs. State, the Court uses this language: "As to the threats made both when the knife was produced and when it was not, we think they were admissible in evidence, without reference to whether they had or had not been communicated to

the Defendant." If the Defendant had made previous threats of killing the deceased, it is very clear that they would have been admissible in evidence, and we cannot see any good reason why the threats of the deceased against the Defendant are not competent evidence.

We have thus far presented this case, conceding for the sake of the argument the position assumed by the Court below, and no doubt will be claimed by the Counsel for the People—that is, that it is necessary the evidence should raise a doubt as to who made the first assault, the deceased or the Defendant.

But we base our claim to this class of testimony on broader grounds. The jury being the sole judges of the testimony uncommunicated threats should have been admitted for their consideration, as a circumstance in connection with the other testimony; and the Court had no right to exclude it because as he said, no predicate had been laid—assuming to say to the jury, there can be no doubt as to who committed the first assault. This was not only one of the, but *the* most vital question in the case, to be passed upon by the jury, and was in effect decided by the Court.

Prigden vs. State, 31st Texas, 420; Cases Self Defense, 416.

Jackson vs. State, Tenn. April Term, 1873; Cases on Self Defense, 476.

In this (Jackson) case the Court says: "The effect of the ruling of the Court below was that the circumstances surrounding the parties developed on the trial were not sufficient to extenuate or justify notwithstanding the threats. This was a question of fact for the jury." The burthen of proof never shifts from the prosecution, and the credability of the witnesses is for the jury, not the Court, to determine. If from the whole evidence the jury had a reasonable doubt as to who fired the first shot, or made the first demonstration, they should acquit or reduce the grade of offense. But the Court took this question away from the jury. In the case of the People vs. Scoggins, 37 Cal., page 700. Sanderson, J., uses this language: "but it has been argued with much ability and force that the purpose suggested is not the only purpose that can be subserved by such testimony, it being claimed that previous threats made by the deceased or injured party are facts or circumstances which tend to illustrate the question as to which party was the first assailant, and is of controlling weight in doubtful cases."

* * * * That threats indicate the presence of malice and afford rational grounds for the acts charged especially in a case of conflicting testimony.

The judge then says: "This view seems to be sustained by the case of the People vs. Arnold, 15 Cal. 476, and then approves of the reasoning of counsel, and adopts it as his own in his conclusion.

Jackson vs. State Tenn., April Term, 1873, Cases on Self Defence, 476.

Williams vs. People, 54 Ill., 422.
Commonwealth vs. Wilson, 1st Gray, 337.
Stokes vs. People, 53 N. Y., 164.
Collins vs. State, 32 Iowa, 36.
Dupree vs. State, 23 Ala., 380.
Monroe vs. State, 5 Ga., 48, Cases on Self Defence, 442.
People vs. Shoter, 4 Borbor, 460.
Patterson vs. People. 46, Borber, 625.
Keener vs. State, 18 Ga., 194, Cases on Self Degence, 539.

III.

The Court erred in giving the fifth instruction. The deliberate pulling of his pistol by the Defendant, and a deliberate shooting of deceased in the absence of premeditation and malice is not murder in the first degree as stated by the Court in this instruction.

IV.

In the sixth instruction the Court says: "But the defence rests entirely upon the ground of self defence, and not that it was done deliberately, etc.

Putting the language of these two instructions in form of a syllagism, it will read thus; Killing deliberately is murder in the first degree; the killing is admitted to have been done deliberately, hence it is murder in the first degree.

V.

The ninth instruction is erroneous. It says: That before the prisoner is justified in taking the life of the decease, it must be made to appear that his safety required him to do so.

This instruction takes away the right of every person has of acting upon appearances, if they are such as to excite the fears of the prisoner that he was in danger of bodily harm without any negilence on his part as to the actual state of facts.

Wharton's Law of Homicide, (2nd Edition) Sec. 496 to 503, inclusive.

The eleventh instruction is subject to the same objection as the above.

Whaton, etc., 496 to 503.

VI.

The twelfth instruction states the law thus: "That where threats are made, to be any excuse, they, the threats, must be accompanied by, or connected with, a present purpose and ability to carry those threats into execution."

The objection that applies to the 9th instruction applies with great force to this.

VII.

The Court allowed the character of the deceased to go to the jury as competent evidence, but in the 13th instruction tells the jury not to consider such testimony unless a certain state of facts exist. This we think error as it is proper testimony to be considered by the jurr in any case.

Jackson vs. State, in Cases of Self Defence, 476, 480.

Phillips vs. Com., 2 Duvall, 328.

Cases Self Defence. 383.

Carico vs. Com., 7 Bush, 124.

Cases Seld Defence, 389.

Bohannan vs. Com., 8 Bush, 481.

Cases on Self Defence, 295.

As to the 13th instruction see

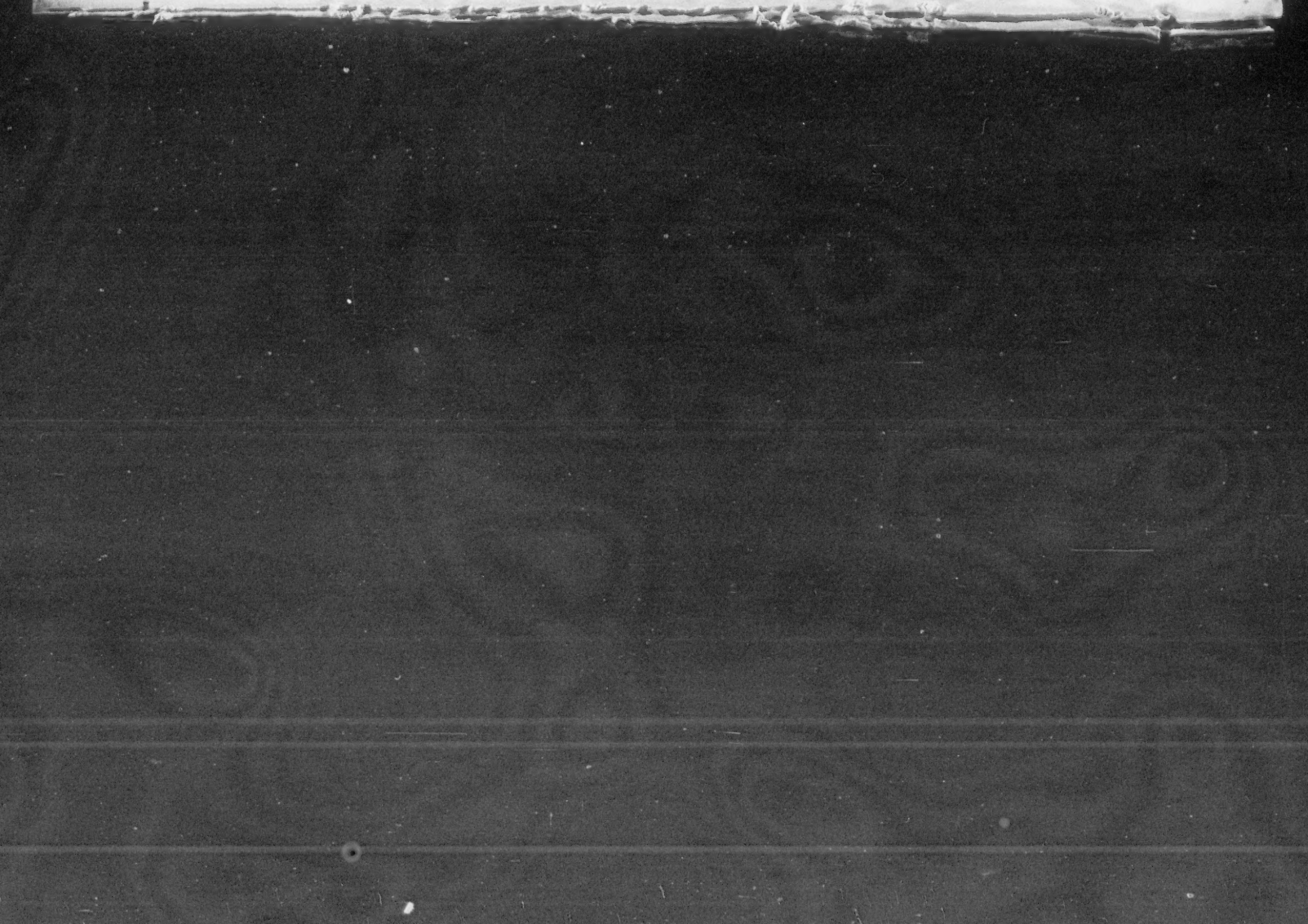
Pritchett vs. State, 22 Ala., 39.

Franklin vs. State, 29 " 14.

Cases Self Defence, 635, and 641.

E. D. HOGE and C. H. HEMPSTEAD,

Attorneys for Plaintiff in Error.



In the Supreme Court of the United States.

OCTOBER TERM, 1876.

JOHN G. WIGGINS
vs.
THE PEOPLE OF THE UNITED STATES. } No. 885.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

Brief for the United States.

This case is one of homicide (see act of 1874, ch. 469, sec. 3, 18 Stat., 254) by the plaintiff in error in the killing by ~~first shot~~ shooting of one Kramer at Salt Lake City, about 2 o'clock in the morning of May 15, 1875.

The evidence showed that Kramer, who was (record, folio 43) a man of *bad character, dangerous, violent, vindictive, and brutal*, had, during the preceding evening, (folio 27 and 40) been at the saloon kept by the prisoner, and while there had had a difficulty with one Bean, in which both parties drew pistols, and that the prisoner had interfered and put them both out by force, taking their pistols from them.

At the time of the killing the prisoner was going from his place of business, and shortly before was walking along with his wife, (folios 37, 38 and 45,) who, however, seems to have separated from him before the killing.

The only witness who saw the deceased at the moment

when the firing commenced was one Dobson, who testified as follows, (folio 30:)

"I know John G. Wiggins, the prisoner, and knew John Kramer in his life-time. He was shot on the morning of the 15th day of May, 1875, in front of the Salt Lake House, in Salt Lake City, in the county of Salt Lake, and Territory of Utah. As I came down street about 2 o'clock in the morning I saw Dutch John sitting on the carriage-steps of the Salt Lake House, with his face resting on his hands, apparently in a stupor or sleep. Wiggins, the defendant, was with me. He (Wiggins) jumped to my rear and immediately the firing commenced. I do not know and cannot tell who fired the first shot. At the first report I turned round and saw the blaze of the second shot from a pistol in the hands of Wiggins. I had advanced to the carriage-steps and said, "Jack, don't kill him." Wiggins then jumped on the carriage-steps and fired another shot, which passed right by in front of me and into the body of Dutch John. Dutch John grabbed me around the legs and we fell over the steps into the street. When I turned and saw the first shot from Wiggins's pistol, I saw Dutch John's hands raised, and heard him cry out, "Don't kill me, I am not armed." Immediately after the firing ceased, Wiggins stooped down as if to pick up something, and when he raised up he had something in his left hand, but I cannot tell whether it was a pistol or not. At the same time Wiggins made the remark to the deceased, "You wanted to kill me," or "You tried to kill me." I am not sure which expression was used.

On the trial (folio 41) the defendant called one Heslop, who said that just before the shooting the deceased showed him a pistol which he had upon his person. He was thereupon asked, *What, if any, threats did the deceased make against the defendant at this time?* This was objected to by the prosecuting attorney as immaterial, and thereupon was excluded, the prisoner duly excepting thereto. In the same connection defendant's counsel stated that "they expected to prove by this witness that in that conversation, a short time prior to the killing, that

the deceased, in the hearing of said witness, made the threat that he would kill the defendant before he went to bed on the night of the homicide, which threats we cannot bring home to the knowledge of the defendant." Upon objection this also was excluded by the court, and the defendant then and there excepted.

The above exclusion of evidence is the only error upon which, I am ~~satisfied~~ notified, counsel for the prisoner rely in this court.

It presents the question whether threats by the deceased not communicated to the prisoner are competent evidence in a case circumstanced like the above.

Wharton, in section 1027 of his work upon criminal law, (vol. 2,) states the doctrine upon this topic in the following language: "Yet when the question is as to what was the deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to the defendant. The evidence is not relevant to show the *quo animo* of the defendant; but it may be relevant to show that at the time of the meeting the deceased was seeking the defendant's life."

It seems that there was no question here—or none supported by evidence—as to the *attitude* of the deceased at the time when the firing commenced. There is no contradiction to the evidence that he was then "sitting on the carriage-steps of the Salt-Lake House, *with his face resting on his hands, apparently in a stupor or sleep.*"

It seems that there can be no pretense that this attitude of the deceased was such as to cause apprehension to the prisoner, or that it could receive color to that effect from the circumstance of his having previously made threats against him. The existence of previous threats gave to the prisoner *then and there* (which is what we have to consider) no excuse for firing upon *a man "sitting with his face resting on his hands."* The deceased was so sitting when he received his *death-wound*, according to the opinion of the physician, (folio 29.)

When Dobson says that he does not know who fired the first shot, he evidently does not mean that he does

not know but that the deceased did, but that he does not *know* but that some third person did. He intends to call attention to the fact that owing to the prisoner's jumping to his rear he did not *see* who fired the *first* shot, although, by turning, he did see the prisoner fire the second. His testimony places the deceased in such a condition that he could not have fired such first shot; and there is no evidence that any other person than the prisoner did.

I do not refer to the other parts of the testimony. It was all no doubt fairly considered by the jury, but throws no light upon the attitude of the deceased at the time when the prisoner attacked and killed him. That attitude is given by Dobson alone as above, and plainly was that of a non-combatant. The evidence of Dobson and of Dr. Benedict concur in showing that Kramer received the wound which caused his death while his his head was bowed down in repose upon his hands and breast. What threats he may have previously made are wholly irrelevant in such a position. No one could have supposed that then and there he was actuated by a disposition dangerous to the prisoner.

S. F. PHILLIPS,
Solicitor-General.

5 Ohio St. 174
18 Fed. Rep. 254